United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

75-4101

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4101

ROBERTE NOEL,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys, Of Counsel.

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ISSUE PRESENTED

WHETHER THE DECISION OF THE BOARD OF IMMIGRATION APPEALS, AFFIRMING THE IMMIGRATION JUDGE'S DENIAL OF NOEL'S APPLICATION FOR WITHHOLDING DEPORTATION, WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a, Roberte Noel petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on May 5, 1975. That order dismissed an appeal from the decision of an Immigration Judge denying Noel's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h). Petitioner contends that the Board's order should be vacated and the cause remanded for further proceedings before the Immigration Judge.

STATEMENT OF FACTS

The petitioner is a 39 year old alien, a native and citizen of Haiti, who was admitted to the United

States on October 27, 1969 as a nonimmigrant visitor for pleasure, and was authorized to remain until July 25, 1970. She failed to depart at the expiration of her authorized stay and has continued to reside in this country in violation of the law.

On March 27, 1973 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings against the petitioner with the issuance of an order to show cause and notice of hearing charging that she was deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2) by reason of her having overstayed her authorized visitation (T. 11).* After the commencement of deportation proceedings Noel applied to the Service's District Director in New York for political asylum. The scheduled deportation hearing was adjourned in order to give the District Director an opportunity to consider her application for asylum. In

*References preceded by "T" are to the certified administrative record which has been filed with the Court.

accordance with established procedures, see 8 C.F.R. §108, the Service's District Director requested an advisory opinion from the Department of State, Office of Refugee and Migration Affairs (T. 10). On April 10, 1974 the Department of State responded and found that there was no reason to believe that the petitioner should be exempted from regular immigration procedures on the ground that she would suffer persecution within the meaning of Section 243(h) of the Act. On April 17, 1974 the Service denied the petitioner's request for political asylum, and proceeded forward with the deportation proceedings.

At her deportation hearing on September 10, 1974 the petitioner, by her counsel, conceded her deportability as charged in the Order to Show Cause (T. 6, p. 1). During that hearing Noel again applied for withholding of deportation pursuant to Section 243(h) of the Act (T. 6, p. 2, T. 7). In response to that application for discretionary relief the Service's trial attorney offered into evidence the Department of State's advisory opinion which had previously been obtained by the Service (T. 9),

as well as the District Director's request for that recommendation (T. 10). During the hearing the petitioner was questioned by her attorney in an effort to elicit testimony which might have supported her alleged fear of political persecution.

On January 10, 1975 the Immigration Judge rendered a decision denying Noel's application for withholding of deportation. The decision noted that Noel had failed to sustain her burden of proof with regard to her claim of anticipated persecution. The Immigration Judge granted her the discretionary privilege of voluntary departure in lieu of enforced deportation pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e). On January 24, 1975 the petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T. 4). On May 5, 1975 the Board dismissed that appeal (T. 3). On June 3, 1975 the alien filed this action for judicial review of that order. Since the filing of this petition she has enjoyed the automatic statutory stay of deportation which accompanies the filing of a petition pursuant to Section 106 of the Act, 8 U.S.C. §1105a.

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253 -

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

RELEVANT REGULATION

Title 8, Code of Federal Regulations (C.F.R.) §242.17
242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation *** The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent

evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

POINT I

THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETIONARY AUTHORITY IN DENYING PETITIONER'S APPLICATION FOR TEMPORARY WITHHOLDING OF DEPORTATION

A. General Background

Section 243(h) of the Act, 8 U.S.C. §1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.*

*The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

Muscardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); United States ex rel. Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968).** The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. Cheng Kai Fu v. Immigration and Naturalization

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**The petitioner incorrectly describes the burden of proof in these proceedings (Petitioner's Brief p. 5). The Government must prove that Noel is deportable by clear, convincing, and unequivocal evidence. This was established when Noel conceded deportability (T. 6, p.1) at the deportation hearing. On the other hand, the alien bears the burden of proof with regard to her application for withholding of deportation under Section 243(h) of the Act. 8 C.F.R. §242.17).

Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). See also Hyppolite v. Immigration and Naturalization Service, 382 F.2d 98 (7th Cir. 1967); Lena v. Immigration and Naturalization Service, 379 F.2d 536 (7th Cir. 1967).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. Muscardin v. Immigration and Naturalization Service, supra; Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), aff'd., 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the alien's application for withholding

of deportation. Li Cheung v. Esperdy, 377 F.2d 819 (2d. Cir. 1967); Kladis v. Immigration and Naturalization Service, 343 F.2d 515 (7th Cir. 1965).

B. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule; that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. Fu v. Immigration and Naturalization Service, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that she would be subject to persecution. MacCaud v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974). She must set forth the conditions relating to her personally which support

her anticipation of persecution. Fu. v. Immigration and Naturalization Service, supra. This the petitioner is unable to do.

As noted in the Immigration Judge's decision the basis for Noel's claim of anticipated persecution is that her father married a sister of the former president Magliore of Haiti; that her father served as a captain during Magliore's incumbancy in Haiti; that her father, step-brother and step-mother were temporarily detained in Haiti in 1963; that a fellow worker complained that Noel's father was an enemy of the government. The sole evidence submitted by Noel on behalf of the application was her own testimony at the hearing. It is submitted that the Immigration Judge properly found that testimony lacking in credibility. The record of proceedings reflects that Noel has never personally been arrested or harmed in any way, by the present, or any former government of Haiti. There is no evidence that she has been involved in any political activities in Haiti or elsewhere. She was given a passport and identification card by the Haitian Government for her departure from that country, and the same passport

was revalidated by the Consulate General of Haiti in New York on September 5, 1969 (T. 6, p. 11-12, T. 9, T. 10). Despite her testimony that she fled Haiti and went to French Guyana because it would have been more difficult to come directly to the United States (T. 6 pp. 5, 9), the record reflects that she obtained an exit permit and passport which were valid for travel to all countries (T. 6, p. 12). In addition, neither her husband nor her five children, who currently reside in Haiti, appear to be the victims of political repression by the present Haitian Government. Further, the record reflects that Noel's decision to leave her employment in 1967, a year before she left Haiti, was her own decision and nothing in the record reflects that she or her family have been unable to support themselves in Haiti as a result of political persecution.

It is respectfully submitted that Noel's contention that this action be remanded to the Immigration Judge for a hearing as to the actual conditions of life

in Haiti is frivolous and made solely to prolong her illegal sojourn in this country. Whether or not the National Geographic's account of the general conditions existing in Haiti is accurate (see Petitioner's Brief p. 6) the petitioner had ample opportunity to establish in the record of proceedings, both at the time of her interview with the District Director (T. 10), as well as during her deportation hearing. Furthermore, it is not necessarily the general conditions in Haiti that are relevant in these proceedings. As noted in Point I, A supra, the petitioner must establish that there exists a clear probability that she will suffer persecution if deported to Haiti. The general conditions in Haiti, as well as, unsubstantiated allegations that relatives were temporarily detained in Haiti thirteen years ago for some unknown reason will not satisfy this requirement.

C. The advisory opinion from the Department of State was properly admitted into evidence during the deportation proceedings.

This petitioner first made an application for political asylum with the District Director for the

Service (T. 10). Under established procedures, §C.F.R. §108, if the District Director does not immediately approve the claim, he forwards it to the Office of Refugee and Migration Affairs, Department of State, for an expression of its views. The letter from the Department of State is merely advisory in nature and is not binding upon the Service. After studying the case, the Director of the Office of Refugee and Migration Affairs was of the opinion that petitioner did not have a valid persecution claim and the District Director concurring denied the application. The refusal of the District Director to grant an application for asylum does not deprive the alien of again applying for withholding of deportation pursuant to Section 243(h) of the Act at a deportation hearing.

Subsequently, petitioner applied for withholding of deportation and her persecution claim was considered de novo by the Immigration Judge. The Immigration Judge did not request an expression from the Department of State concerning the likelihood of persecution. Rather, the Service's trial attorney offered into evidence the letter

from the Office of Refugee and Migration Affairs obtained earlier by the District Director. The letter was merely one piece of evidence considered by the Immigration Judge and was in no way binding on him.

It is submitted that this recommendation came from a knowledgeable and competent source and was therefore admissible at the hearing. Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1969). Such letters have been held admissible, Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1969); Sheng v. Immigration and Naturalization Service, 400 F.2d 678 (9th Cir. 1968), cert. denied, 393 U.S. 1054 (1969), even though their quality may be questioned. Hosseinmardi, supra. In this case the advisory opinion was certainly probative in nature, and could be considered by the Immigration Judge in rendering his decision.

The Immigration Judge made his decision based on the totality of the evidence, including the petitioner's

testimony. He enjoyed the advantage of seeing and hearing the petitioner, and was in the best position to determine the accurance, reliability and truthfulness of the petitioner's testimony; and his evaluation thereof is entitled to great weight. Matter of Herreros, 11 I. & N. Dec. 772 (1966); Tisi v. Todd, 264 U.S. 131 (1924); Kokkinis v. District Director, 429 F.2d 938 (2d Cir. 1970); Sigurdson v. Landon, 215 F.2d 791, 796 (9th Cir. 1954).

The deportation hearing complied with all the requirements of a fair hearing. Sung v. McGrath, 339 U.S. 33 (1950). The petitioner was represented by counsel. She was given the opportunity to be heard and to introduce evidence and witnesses on her behalf. 8 C.F.R. §242.16. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be allowed to stand.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE DISMISSED.

Dated: New York, New York

February , 1976.

Respectfully submitted,

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United States Attorney for the
Southern District of New York,
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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 75-4101

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

19th day of February, 1976 she served a copy of the

within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Claude Henry Kleefield, Esq.,
Suite 400
100 West 72nd St.
NY NY 10023

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

19th day of February, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977